NO. 92-515

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

On Writ of Certiorari
to the Supreme Court of Wisconsin

BRIEF AMICUS CURIAE OF WISCONSIN INTER-RACIAL AND INTER-FAITH COALITION FOR FREEDOM OF THOUGHT IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

This brief* is submitted on behalf of the Wisconsin Inter-Racial and Inter-Faith Coalition for Freedom of Thought.

The Coalition consists of Wisconsin citizens - civil rights attorneys, legislators, former legislators, clergy, social workers and educators - who have a longstanding involvement in public affairs and who are convinced that the Wisconsin Hate Crimes Statute is not the correct approach to solving the acknowledged problem of bias crimes. The interest of the Coalition is in content-neutral approaches, which we will describe.

*Kim Ian Moermond, a student at Harvard Law School, assisted in the preparation of this brief.

SUMMARY OF OUR POSITION

Crimes of hatred are especially repulsive to a nation committed to the integration of its many different peoples. There is no question that we, our society, our states, and the Federal government oppose such crimes. There is also no question that we should oppose them more vigorously. We are also a nation which values freedom of speech, thought, and association to an extent unknown in any other country now or before. One way this is expressed is through the constitutional guarantees which require clearly defined laws and firmly established procedural protections in the execution of those laws. The objective here is to find the best way to combat "hate crimes" without compromising or jeopardizing any of the other principles we hold dear. Wisconsin's hate crimes penalty enhancer, although well-intentioned, is not the right way.

In opposing the penalty enhancer approach we are not suggesting that the Court turn a deaf ear to the acknowledged problem of hate crimes. Nor do we accept inaction in the face of a problem we see only with profound sorrow. Since we deeply share the State's concern over crimes of hatred, we feel it our obligation to suggest ways in which a constitutionally acceptable response to hate crimes might be fashioned. There are effective ways to target crimes of this type without cutting into First Amendment values or compromising criminal procedure protections. We will suggest augmenting aggravating factors in *sentencing* and also a separate statute targeting crimes of *terror*. Only these two options, we believe, can steer a clear path between the "pre-conviction" First Amendment concerns of *R.A.V.*, on the one hand, and the post-conviction First Amendment concerns of *Dawson*, on the other.

To the extent that the Wisconsin statute is seen by all as a "test" or guideline-setting case for similar statutes across the country, we would ask the Court to consider the many problems we have found in the *structure* and *operation* of the Wisconsin statute. A good deal has been rightfully said about hate crimes, but much of this discussion has left the actual statutes far behind.

The closer one examines the Wisconsin enhancer, the more one notices the difficulties in interpretation, the ambiguities about its implementation, and the basic flaws in its structure and design. These problems have relevance beyond Wisconsin. It was, in fact, the wide discrepancy in explanations about how these laws would work and what their scope would or should be, which finally prompted us to write. We, too, want to punish these crimes more severely, but we are unwilling to unnecessarily compromise our legal protections to do so. There are feasible and effective alternatives. We are still at a point in the process of making and applying these types of laws that we may yet design a constitutionally acceptable mouse trap. The Court must ensure that this is done without either compromising *R.A.V.* or diluting *Dawson*. We offer our analysis in the hopes that it may be of some assistance.

SUMMARY OF THE ARGUMENT

The issues for the Court in *State v. Mitchell* are best framed by first identifying what this case is not about. The question for the Court is not whether the motivations of a criminal may be considered by the court in *sentencing*; nor whether consideration of motive in sentencing can result in a lengthier sentence. The question is not even whether or not the State may link motivational factors to an element within another offense; such as the Federal and state laws punishing intentional interferences with the exercise of civil rights (although we would counsel that these laws are and should remain keyed to the *actus reus* interference referent). No, the question for the Court is: Is the State permitted to punish motive *directly* as the *principal element* of a *separate criminal charge* in the *guilt-phase* of a criminal trial on a *non-neutral content basis*. This is the question of *State v. Mitchell*.

We have no doubt that legislative *power* includes the ability to punish these crimes more severely than others. However, the scope of legislative power remains a function of *how* the state seeks to implement its measures. *One way or*

another these people *will* be punished more severely. But this does not mean that *any* way is permissible. This statute is the wrong approach. By seeking to punish bad motives directly as a separate offense in the guilt-phase of a trial, the enhancer jeopardizes crucial Constitutional principles thrice. Not only does the enhancer infringe *directly* upon First Amendment protections, but it infringes a *second* time *and* violates due process because it exacts punishment without any clearly specifiable scienter requirement. Allowing this combination of First Amendment and due process violations would set dangerous precedents in our administration of criminal justice. Thus, one need not suggest that there is *expression* in these activities to resist vague and overbroad statutes. The cure of diluting basic scienter requirements will undoubtedly come back to plague us with new diseases. And whatever does eventually happen with how sentencing is handled in this country, our legal system will not be well served by purposely blurring the lines between the guilt and sentencing phases of a trial.

We will focus on the structural underpinnings of the First Amendment and due process problems which render the enhancer incurably vague and overbroad. These are highlighted by, and often only further aggravated by, the State's attempts to dodge or define away the First Amendment limitations. The "ball" to keep an eye on is: what is the enhancer and how does it handle motive? The answers given to these questions have been alarmingly vague and inconsistent. These are threshold problems. Without first solving these underlying flaws, the State need not worry whether it *would* fall within *O'Brien* or stricter tests. It does not reach that stage. These problems doom the Wisconsin statute, but identifying their sources and contours will help us frame alternatives.

ANTI-DISCRIMINATION LAWS DISTINGUISHED

The enhancer can and must be distinguished from both civil anti-discrimination laws and the criminal provisions of Federal civil rights laws. Neither set of laws supports the

wholesale and boundless expansion of "liability" which would accompany laws like Wisconsin's enhancer. Equally important, these laws can and must be distinguished from one another. The civil rights statutes are specific intent criminal provisions, while the civil anti-discrimination laws employ tort-based causation and liability standards. Our problem with the enhancer is that it straddles this divide, speaking in terms of tort-liability, but inflicting criminal punishments. The enhancer would impose tort-liabilities without the corresponding duty context, and would exact criminal penalties without the necessary scienter requirement. Civil anti-discrimination legal standards must not be imported into criminal law this way. When the Federal provisions are properly analyzed, they will suggest and support our approach instead of the enhancer.

Our inquiry should begin by responding to the now oft-quoted question posed by Justice Bablitch in his dissent in the Wisconsin Supreme Court. Justice Bablitch asked:

> "How can the Constitution not protect discrimination in the selection of a victim for discriminatory hiring, firing, or promotional practices, and at the same time protect discrimination in the selection of a victim for criminal activity? How can the Constitution protect discrimination in the performance of an *illegal act* and not protect discrimination in the performance of an *otherwise legal act*?"(P.A. 54)(emphasis supplied)

But this is precisely the point! In comparing anti-discrimination laws to the enhancer, Justice Bablitch said, "[b]oth sets of laws involve discrimination, both involve victims, both involve action 'because of' the victim's status."(P.A. 54) *However*, they do not both include a predicate, or underlying offense. The whole point of the anti-discrimination laws was to create an offense where none existed before. The "*otherwise legal act*" Justice Bablitch refers to, would be the ability to refuse to hire someone "because of" that person's race, etc. This, of course, would be "*otherwise legal*" without the anti-discrimination laws. By contrast, the enhancer seeks to create a second offense on top of the first. The only extra "element" between the two charges which the

enhancer can punish is motive.

Understanding the genesis and the nature of the new offense created by anti-discrimination law, not only goes to answering Justice Bablitch's question, but to exposing why he is mistaken in attempting to transport tort-based liability into the criminal context. As with all tort-based liabilities, anti-discrimination laws are premised on a *duty* with respect to a given activity. Absent that duty, there can be no liability for the act. In anti-discrimination laws this duty is either imposed on the government itself, or transferred into some distinctly structured activity, typically a vital social-infrastructural function, such as employment and housing.

The State suggests that since the government can punish "discriminatory acts" in other contexts then it must be able to do so here. The logic, it would appear, is "in for a penny in for a pound." Aside from the fact that the premise itself requires serious qualification, the enhancer would bring a limitless expansion of the concept. The enhancer would reach into all private activities; in all contexts, and once the precedent were set allowing the State to punish bad motive directly as an element of a separate offense in a criminal trial, there would be nothing to prevent the next intrusion. The question of whether the legislature has the *power* to construct and impose such a duty cannot be answered independently of the *execution* of that power, i.e., *how* it would do this. It is this issue we address.

THE DANGER OF MIXING TORT & CRIMINAL LAW

The most crucial distinction concerns the difference in the liability and causality standards. The proponents of the enhancer have glided back and forth across the spectrum of our laws alighting wherever and whenever anything approaching the term *discriminatory intent* or the word *motive* appears. The assembled legalisms are then jumbled together with the purpose of *proving* that the enhancer, too, may punish discriminatory *intent* or *motive* because this is done in *x*, *y* or *z* contexts. But the question here remains: Is the State permitted to punish bad

motives directly as an element in a separate criminal offense during the guilt-phase of a trial, on a non-neutral content basis. *No* case has been submitted as precedence for that proposition.[1]

Legal terms are only useful when they are used consistently. When removed from context they not only cause confusion, but they may likely do damage in the new context. So it has been with the enhancer's effort to transport tort-based concepts and standards into the criminal context. The term *intent* is used in both tort and criminal law, but it does not mean the same thing in both.[2] In criminal law, the concept is both precise and constant. In tort, the term refers to liability with respect to causation. Unlike its criminal cousin, intent in tort is often used for, and substituted by, the term *motive*, especially so in the anti-discrimination context. Does one need any further reasons to be extra cautious about attempts, especially if *intentional*, to mix criminal and tort concepts together?

The disparity in meanings becomes even more pronounced when one adds the word *discriminatory* to *intent* and then builds a very unique procedural and jurisprudential framework around the new term.[3] In addition to a meaning, the term(s) now has a *function* -one quite alien to intent in criminal law. The so-called

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[1] The closest anyone has claimed to come to proving that motive can be punished directly as an element was the *Brief of Amici Curlae States*, at p. 24. They actually cited *Screws v. United States*, 325 U.S. 91, 101, 65 S.Ct. 1031, 1035 (1945), which makes exactly the opposite point.

[2] *Definitions: Black's Law Dictionary* (6th ed. 1990), Mens Rea, at 985, Criminal Intent, at 373, Intent at 810; *Model Penal Code* § 202; *Restatement (Second) Torts* § 8A, cmt a (1965), "'Intent,... has reference to the consequences of an act rather than the act itself."; *See also*, W. Page Keeton et al., *Prosser & Keeton on Torts*, § 8,(5th ed. 1984);

[3] *See*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089 (1981); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775 (1989).

intent requirement[4] serves less as a distinct element than a residual liability threshold within a larger procedural burden-shifting framework, albeit still phrased in substantive form. The substance and function of the term is also influenced by the scope and contours of the overarching legal duty imposed in this field.[5] Indeed, it is hard to conceive of the *intent requirement* fully apart from that context. By the time we have travelled through the burden-shifting matrix of *McDonnell Douglas* and *Burdine* through to *Price Waterhouse* we can expose legal liability, but this is hardly *intent* as its known in the criminal context. It makes little sense to speak of partial intent or mixed-motive or "but for" or substantial factor *intent* in criminal law. Likewise, the fact that *intent* and *motive* may be used interchangeably in anti-discrimination contexts only further highlights the distance from criminal *intent*. Thus, it cannot be said that someone who acts with *discriminatory intent* in a Title VII context would therefore have satisfied a *discriminatory intent* element were one required in a criminal statute. Were there ever such a transitive quality to the term, it has surely been lost in the process. Yet, precisely such a mixing of tort and criminal constructions is found in numerous statements and examples given by proponents of the enhancer.[6] An example of this transitive reasoning is

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[4] *Intent* in employment discrimination has also been called or *discriminatory intent*, *discriminatory purpose discriminatory motive deliberately discriminatory motive*, *deliberately intentional discrimination*, *discriminatory animus*, *intentional discrimination*; *intentional discriminatory motive or purpose*, and/or just *intent* and/or *motive*.

[5] *See*, *Washington v. Davis*, 426 U.S. 229, 244, 247-248, 96 S.Ct. 2040, 2050-2051 (1976). Constitutional versus statutory requirements.

[6] The argument runs either of two paths: (1) discriminatory intent may be punished in Title VII = discriminatory intent = discriminatory motive = motive = *Dawson* = *Dawson* plus a stretch = State may punish motive directly; or, (2) "discriminatory acts" may be punished in Title VII = discriminatory acts are intentional = intentional selection + plus racial motive = discriminatory motive = discriminatory intent = discriminatory act = intentional acts are punishable directly in criminal proceedings.

illustrated in the following excerpt from the State's Brief. We have underlined and numbered all those terms or phrases which are misleading by having succumbed to the unqualified mixing of tort and criminal terminology.

> "**(1)** Discriminatory motive plays exactly the same role in both the enhancer and other anti-discrimination laws. In both cases, the **(2)** presence of discriminatory motive *alone* **(3)** affects the sanction imposed on conduct. In the penalty enhancer context, the existence of a discriminatory motive is the difference between a **(4)** higher or a lower maximum penalty. Under other anti-discrimination laws, the existence of a **(5)** discriminatory motive is the difference between liability and no liability at all.(Pet. 31)

Statement (1) we have just shown is untrue; as is (2). Phrases (3) and (4) are euphemisms for "a *separate criminal charge* heard directly in the *guilt-phase* of the trial exacting its *own* penalties." The word "conduct" in (3) refers to what Justice Bablitch calls the *"act of selection,"* as opposed to the *reason* or *motive* for the choice (below). Statements (5) and (1) will become of interest below when the State later denies that the enhancer targets motive. Clearly, the State has imbibed a mixture of tort and criminal concepts while attempting to operate the enhancer.

Next, *discriminatory intent* or *motive* in discrimination law does not actually *prove* bigotry or truly bad motive. It only means that a person charged with a duty has improperly treated another person differently because of race, etc., *regardless* of what motivations actually drove the person to do so.[7]

A final crucial reason to resist direct and unqualified importation of standards developed in Title VII cases into criminal law is recognition of the fundamental difference between a Title VII hearing and a criminal jury trial. It would be unwise to weave these civil standards into the criminal context,

[7] If bad motive were the target, then why may tenants discriminate against landlords, e.g., refuse to rent from a landlord because of that landlord's race, perhaps even with the intent of bankrupting him or her? The asymmetry results from the nature and limits of the duty imposed.

especially at a point when the employment discrimination process may become even more administrative in form.[8]

CRIMINAL STATUTES DISTINGUISHED

The criminal provisions of the civil rights laws include, 18 U.S.C. §§ 241, 242, 245; 42 U.S.C. §§ 1985; 42 U.S.C. 3631. Because they provide for criminal sanctions, they are seen as the strongest *potential* precedent the State could claim. The enhancer, however, differs fundamentally from these statutes. As with the civil anti-discrimination laws, these few criminal provisions have a specific and limited context. In general, each of these statutes reflects a governmentally created or guaranteed rights context. Like their civil counterparts, they created offenses where none existed before, or rather where other applicable laws were unenforced or were not directly protective. They shape their protections around primary citizen rights with regard to participation in public activities, using public services and facilities, and exercising basic citizenship rights.[9]

The Federal provisions require specific intent to prevent another from exercising protected rights and privileges.[10] The precise wording varies, but the typical prohibition is to willfully injure, intimidate, or interfere (§ 241, § 245, § 3631) by force or threat of force (§ 245, § 3631) with the exercise of specified

[8] *See*, John J. Donohue III & Peter Siegelman, Peter; *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 984 (1991). The contrast with the NLRB hearings is even more striking.

[9] Note, 18 U.S.C. § 242 also applies to aliens. 42 U.S.C. § 3631 covers fair housing, likewise a societal-infrastructural necessity. 42 U.S.C. § 1985(3) prohibits conspiracies to interfere with civil rights. In this sense, all these form part of a continuum of statutes (both civil and criminal) aimed at protecting general public activity and participation, and preventing disruptions and deprivations in those areas. *See also*, § 1981 (contracts); § 1982 (property); § 1983 (state action).

[10] *See*, *Screws v. United States*, 325 U.S. 91, 65 S.Ct. 1031 (1945); *United States v. Guest*, 383 U.S. 745, 86 S.Ct. 1170 (1966).

rights. §§ 245 and 3631 include the intent to interfere "on account of" the race, etc. of the affected person(s) The Federal provisions are thus not generalized tort laws. They are not even generalized anti-discrimination laws. There is no violation for interfering with just *any* activity; nor if one discriminates outside the context of public right or activity. Nor do the Federal statutes ask *why* one interfered in protected activities, only whether one formed the requisite specific intent to do so. Bad motive is neither required nor sufficient[11] The State cites *Bray v. Alexandria Women's Health Clinic*,(Pet. 30 n. 3), which under § 1985(3) requires *animus*, to suggest that the State may likewise target *animus*.[12] This, however, neglects the context and *actus reus* referents of those distinct offenses. Neither 1985(3) in *Bray* nor the other provisions would allow punishing *animus* independently of the intentional interference, etc. Finally, the notion of an underlying crime is essentially irrelevant; the Federal provisions require no predicate offense, only intentional interference. Where force and/or conspiracy are required, they are then constituent elements. The *actus reus* is interfering.

As such, these crimes provide a model for an *anti-terror* statute, not the enhancer. Even were the enhancer to assume civil rights law format, the difference would still be as between one statute which prohibited interference with *any* protected right for *any* reason versus the enhancer version which would increase penalties only for interferences done by reason of bias. Without the *actus reus* referent and the specific intent as to that offense, and unable to re-punish the intent subsumed in the underlying crime, the enhancer has only the *why*, the *reason*, the *motive* left to punish. Even if recast into a lesser-included-offense

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[11] *Screws*, at 106-107, 1038.

[12] 61 U.S.L.W. 4080 (U.S. January 13, 1993 (§1985(3) also requires conspiracy); *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790 (1971) introduced the animus requirement so as not to create an open-ended federal tort law. To this extent, the animus requirement cannot be read independently from the requirement to define the class.

framework, the "extra element" between the enhancer crime and the underlying crime is still motive. This is beyond what the Federal provisions can condone. First, by targeting motive directly, and also selectively, the enhancer punishes by content. Second, it was the referent offense and specific intent requirement as to that offense which kept the Federal statutes constitutional in the first place.[13] Without a referent, the enhancer has only a subjective and indeterminate motivational "element." It can specify no scienter requirement. Third, these problems are aggravated, and the risk of chilling increased, because the enhancer is not merely more *expansive* than either the anti-discrimination laws or the civil rights provisions, but it is also far more *intrusive*, extending to all private activities, in all contexts.

Finally, this lack of referent also largely explains the difference in admissibility results. The difference is between the multiple element federal offense situation where evidence may be relevant for any number of purposes, versus bringing in the evidence to prove a single *content-based* "element" of motive. Instead, even these typically bizarre cases still reaffirm the intent requirement.[14]

WHAT IS THE ENHANCER?

WHAT IS THE ENHANCER? This is the critical question before the Court today. Curiously, however, the uncertainty about this fundamental question has been missed by many observers. Petitioner's Amici, for instance, seem to be speaking more about their *own* notions of what an enhancer is or *should* be than about this statute. However, as concerns the

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[13] *See, Guest*; *Screws*; and *Smith v. State of California*, 361 U.S. 147, 150, 80 S.Ct. 217 (1959) "The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."

[14] *See, United States v. McInnis*, 976 F.2d 1226, 1230 (9th Cir. 1992).

specific statute before the Court, the simple question of "*what the enhancer is*?" has still not yet been clearly answered by the State.

The Wisconsin Supreme Court invalidated the statute because it found it incurably vague and overbroad. The State criticizes this holding, but the State has itself continued to vary its interpretation of the enhancer and has juggled quite contradictory explanations in the several briefs submitted en route to this Court. Although both the State and the two dissenting Justices believe the statute is clear, they have offered quite different and divergent interpretations as to what the enhancer is and how it operates. Nor are these differences merely variations on a theme. While it is not unusual for dissenting Justices to offer interpretations differing from the State's, it is significant here because these were to have provided a limiting construction. The mere fact that all these interpretations differ, and that the State's position itself shifts, exemplifies vagueness.[15] Enhancers may be "strange beasts," but they cannot be shape-shifters if they wish to survive overbreadth and vagueness challenges.

We now review the various interpretations offered by the State, the dissenters, and selected Amici to see what they believe the enhancer is, and how they believe the enhancer handles motive.

The State's *current* position is tied to its erroneous reading of *Dawson*. Since *Dawson* and other *sentencing* cases teach that speech and associational evidence as to character and motive may be considered in setting sentence, the State now attempts to paint the enhancer as merely another sentencing tool. This position, however, is built on two misconceptions. First, the enhancer is not merely another sentencing tool, but rather operates during the guilt-phase of the trial and yields a separate conviction. Second, this position dangerously stretches and

[15] *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298-2299 (1972). A vague prohibition has three basic dangers, including, failure to give adequate notice of what is prohibited, danger of standardless enforcement, and chilling of First Amendment freedoms.

distorts not only the holding of *Dawson*, but its purpose.[16] The State is suggesting that since *Dawson* says that "the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing," it may therefore punish motivations directly by making them an element of a substantive criminal offense.(Pet. 8)

This mischaracterization of the enhancer as a mere sentencing tool is picked up in the Amici Briefs. The result is a flood of comments on *sentencing*; *Dawson* is invoked repeatedly. Yet even the Amici, despite apparent certainty on this point, are not without some confusion and contradictions. For instance, the *Brief of the National Conference of State Legislatures, et al.*, explains that the Wisconsin enhancer statute merely addresses "a relevant sentencing consideration." (p. 4) It explains that, "[t]he penalty enhancer is in form a law of sentencing..."(p. 13) *However*, only four pages later they explain with equal assuredness that the Wisconsin statute, "*in effect, creates a scheme of greater and lesser included offenses*."(p. 17, n. 11). This is precisely the same fence that the State has tried to straddle throughout these many proceedings.

The Court, however, should have no trouble properly identifying what the enhancer is. When faced with a similar situation in *Garrett v. United States*, 471 U.S. 773, 782-783, 105 S.Ct. 2407, 2413-2414 (1985), the Court found that a provision providing for *enhanced* penalties was in fact a separate crime with separate penalties. The distinction was based on the fact that the provision was not aimed at a post-conviction presentencing procedure but was intended to be tried in all its parts before the court. Mere labels are not dispositive; objective operative features are. *See also, United States v. Davis*, 801 F.2d 754, 755-756 (5th Cir. 1986). For the same reason, this *enhancer* is not a sentencing tool, but rather creates a new and separate crime, heard and punished in the guilt-phase of the trial.

[16] *Dawson*, at 1098. Information about defendant's associational contacts might have otherwise been relevant, but was inadmissible because it was "not relevant to help prove any aggravating circumstance."

By comparison, Wisconsin's "repeater" *enhances* penalties, but no evidence relating to the repeater may be heard during the guilt-phase of the trial.[17] Nor should anyone be fooled by the misleading reference to "*[t]he fact-finder then separately renders a 'special verdict'*" (Pet. 6). This was no bifurcated trial. All evidence for the enhancer was heard directly during the trial, and the "special verdict" was nothing more than the next item to be checked on a single jury verdict form.

The second basic flaw in the State's argument is that *Dawson* does not stand for this at all! *Dawson* did not *expand* the scope of information which a sentencing court may consider, but rather restricted this information to that which is directly relevant to the crime.(*Id.* at 1098) *Dawson* did not say that if certain information is relevant within capital sentencing proceedings that it should therefore be converted into an element and chargeable directly in the principal count during the trial. Nor did *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418 (1983). Ironically for the State's purposes, all the statements marshalled to emphasize a sentencing court's *relatively* wide discretion make sense only by contrast to the more *limited* discretion to receive information in the *guilt-phase* of the trial. This distinction was critical to the Wisconsin Supreme Court.[18]

The State has otherwise distorted the Court's teachings on capital sentencing issues. Seeking to find support for its claim that it may punish motive, the State purports to find analogies buried within specific sentencing schemes. The State writes, "[t]here is no reason to suppose that the Constitution forbids a legislature from defining a crime in terms of motive. For

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[17] Wis. Stat. § 939.62. *See, Block v. State*, 163 N.W.2d 196, 41 Wis.2d 205 (1968); and, *Mulkovich v. State*, 243 N.W.2d 198, 73 Wis.2d 464 (1976).

[18] "Of course it is permissible to consider evil motive or moral turpitude when sentencing for a particular crime, but it is quite a different matter to sentence for that underlying crime and then add to that criminal sentence a separate enhancer that is directed solely to punish the evil motive for the crime." (P.A. 16 n. 17)

example, a capital sentencing scheme that authorizes the death penalty if an offender is motivated by a desire for money does not violate the Constitution. *Jurek v. Texas*, 428 U.S. 262 (1976)."(Pet. 35)...Besides the fact that nothing even close to such a holding may be drawn from that case[19], *Jurek* and related cases serve to underscore our point that the enhancer is not just another sentencing tool, but rather a fully separate charge. In *McClesky v. Kemp*, 481 U.S. 279, 302, 107 S.Ct. 1756, 1772 (1987) the Court approved Georgia's reformed capital punishment practices because, among other reasons, the new practice "*bifurcates guilt and sentencing proceedings so that the jury can receive all relevant information for sentencing without risk that evidence irrelevant to the defendant's guilt will influence the jury's consideration of that issue.*"(emphasis supplied) It follows that all evidence brought in for the enhancer would be "*irrelevant to the defendant's guilt*" because the underlying charges do not concern themselves with whom or why a particular person was chosen. Doing *Dawson* one better, however, the *Anti-Defamation League Brief* suggested that being charged in the guilt-phase of the trial might actually be more beneficial to the defendant.[20] This is curious reasoning, however. According to this logic the defendant would receive the *benefit* of the enhancer evidence *once* to influence his initial charge of guilt and then receive it *again* when the judge uses discretion to increase *that* sentence. ... The ability to "beat the charges" is beside the point. It is the propriety of the charge itself which is at issue.

Finally, with regard to "*discretion*" in terms of sentencing, the State explained in its Brief for Certiorari that the "single exception" to the rule that "the penalty enhancer statute

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[19] Title 5, § 19.03(a)(3) of the statute to which the State is referring does not say "*if an offender is motivated by a desire for money,*" but instead applies if, "*the person commits the murder for remuneration ... or employs another to commit the murder...*" The Court held on the *process*.

[20] "[A] defendant for whom the prosecutor seeks an enhanced penalty is afforded far greater procedural safeguards under the Wisconsin law than without it ...(*continues*)"(p. 23)

merely gives a judge more discretion" is § 939.645(2)(b).(Pet. Cert. 4 n.1) That section directs that a Class A misdemeanor become a felony. In the context of these crimes and the overall problem, however, that is a very misleading view. Fully three-quarters of the bias crimes reported though the FBI recording system were vandalism, intimidation, and simple assault, precisely the crimes where this "single exception" would hit with most force and most frequency.[21]

WHAT ROLE DOES MOTIVE PLAY IN THE ENHANCER?

Ascertaining the precise role of *motive* in the enhancer's operation is critical. Regardless of what one thinks about punishing motive, the statute cannot survive overbreadth and vagueness challenges unless and until the State clarifies exactly what role motive is to play in triggering the enhancer. Either the State admit that it is targeting motive, and thereby be forced to rely solely on its overly broad reading of *Dawson* and its mischaracterization of the enhancer as merely another sentencing tool. Or the State attempt to deny targeting motive, in which case it will be forced to explain how it can prove, much less define or identify *"discriminatory"* selection. Accordingly, the State must answer three simple questions: (1) Is motive the extra "element" required by the enhancer? (2) What quantum, or amount, of motivation is required to trigger the enhancer? (3) What type of motive is required? A brief review of the State's shifting position on this crucial issue follows.

Until citing *Dawson* in the Brief for Certiorari, the State consistently refused to admit that it was bad motive which the

[21] *Press Release* (initial findings report, January 1993); Federal Bureau of Investigation, U.S. Department of Justice. This also indicates that Wisconsin is second only to New York in the number of agencies participating; (copy attached). The majority of offenders are youth between the ages of 16 and 25 years old. *Hate Crime Statistics Act of 1988*, 1988 *Hearings before the Subcommittee on the Constitution of the Committee on the Judiciary*, United States Senate, 100th Congress, 2nd Session, (1988) (Abt report, p. 178).

enhancer was targeting. (*compare* Pet. Cert. 13 *with* Pet. Wis.S. Ct. 23) Even now, it still hedges its bet by implying that a showing of impermissible motive is not required. Before the Wisconsin Supreme Court the State insisted that it did not have to prove "motivation" to employ the enhancer. *"[R]egardless of underlying motivation,"* it was the "act" of intentionally selecting a victim because of his or her race, etc, which was punished. (Pet. Wis.S.Ct. 23) *However*, at another point, when chasing different prey, the State explained, "It is the state's position that the term 'because of' does not indicate that the status of the victim must be the sole or principle *motivating factor.*"(Pet. Wis.S.Ct. 16 n. 3)(emphasis added) So this is how the case left the Wisconsin Supreme Court; the State denies motive is needed, but defines the scope in terms of motivating factors.

In the Brief for Certiorari, having now hitched its wagon to *Dawson*, the State concedes, albeit still tentatively, that it is indeed targeting motive.(Pet. Cert. 13) Yet, in the same brief, the State explains that, "[t]he penalty enhancer does not require a showing of *any particular motive* for the intentional *discriminatory* selection."(Pet. Cert. 5)(emphasis added) But this is doublespeak. *Some* motive is required, then; but how can this *some* motive not be "any particular" motive when it is a "discriminatory" selection which the State seeks to prove?

In its final Brief, the State now freely admits that it is targeting discriminatory motive. The penalty enhancer, it explains, targets offenses caused by "the *discriminatory motive* of the actor."(Pet. 8)[22] Nevertheless, having cleared the section on sentencing cases, and in preparation for *R.A.V.*, the State returns to statements like, "the enhancer does not define itself in terms of 'motive'"(Pet. 34) and, "[t]he enhancer does not require proof of mental process beyond intentional selection because of status."(Pet. 37) ... Of course, this paraphrase of the enhancer's

[22] The State attempted to link the enhancer to anti-discrimination laws with the statement we analyzed above. The State also adds, "the only feature which differentiates discriminatory acts from other acts is the *motive* of the actor." (Pet. 22)(emphasis supplied).

own language *answers* nothing. The State still will not say clearly whether the enhancer is a motive-based or intent crime. The strain is visible as it straddles the two different interpretations. Finally, apparently frustrated with this exercise, the State tries to simply define away the nagging "motive/intent" problem. The State invokes the "*red herring*" doctrine. It asserts that "the 'intent/motive' distinction is a red herring in that it has *no constitutional significance*."(Pet. 35)(emphasis added) Of course, no authority is cited for this revolutionary concept. In effect, the State, unwilling to be pinned down, just throws up its hands and says that it doesn't make any difference. It had already expressed similar sentiments in its Brief for Certiorari: "Regardless of whether it is labeled 'purpose,' 'motive' or 'intent,' it is the desire of the actor that dictates whether the act is criminal."(Pet. Cert. 12)[23] --This confirms our fears. The only other area of law where one may be excused for using intent, purpose, and motive interchangeably and even simultaneously is within the anti-discrimination burden-shifting framework.

The two dissenting opinions in the Wisconsin Supreme Court take a very different approach. Unlike the State, both Justices see this as a directly punishable event, in the guilt-phase of the trial. Justice Bablitch describes this as the "act" and "conduct" of "intentional selection."(P.A. 65) He insists, the enhancer "does not look to motive."(P.A. 65)[24]

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[23] At least one of the *Amici*, however, agreed with this analysis. *See*, *Amici Brief of the Cities, et al.* (pp. 18-19)

[24] "[The enhancer] punishes the act of discriminatory selection plus criminal conduct. The Constitution allows a person to have bigoted thoughts and to express them, but it does not allow a person to act on them."(P.A. 55) ... This is a curious statement, however. Of course, bigots can "act" on their thoughts. They can do all sorts of noncriminal activities, all the while "acting" on their thoughts. The only time they cannot is when they commit a crime. The difference is that if they "act" on their bigoted thoughts to commit one crime, but then commit another

The majority, of course, responds that this is double-counting.[25] Since the "act" of committing the underlying intent crime already covers both *actus reus* and *mens rea* components, the only residual not accounted for is the subjective reason or motivation. The only explanation, then, is that this is not really what the dissent meant. It would appear that they mean the "*act of intentional selection*" to denote a *specific intent* as to the nature of that selection and the underlying offense, i.e., a new offense. There is some indication that this is what Justice Bablitch means.[26] Presumably, the enhancer would create a wholly new offense and/or it would sit atop a lesser-included-offense framework.[27] The problem is, this is not what the legislature enacted; it is not what the State says it is defending; it is not what the Wisconsin Supreme Court discharged. *Even so*, whether framed as a wholly separate offense or atop a lesser-included-offense scheme, the only *element* which differentiates the new enhancer crime from the regular crime or the lesser-included crime, would be that "extra bit" involving the *reason* for

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crime while "acting" on other thoughts, the former, but not the latter, could be punished by the enhancer. Moreover, "act" must have physical qualities. *See*, *Black's Law Dictionary*, 25 (6th ed. 1990); The *Restatement (Second) Torts*, § 2 (1965); *Model Penal Code*, § 1.13(2).

[25] "Selection of a victim is an element of the underlying offense, part of the defendant's 'intent' in committing the crime. In any assault upon an individual there is a selection of the victim. The statute punishes the 'because of' aspect of the defendant's selection, the *reason* the defendant selected the victim, the *motive* behind the selection."(P.A. 35)

[26] "[The enhancer] punishes more severely criminals who act with ... an intent not just to injure but to intentionally pick out and injure a person because of a person's protected status." (P.A. 59)(emphasis supplied).

[27] In effect, *regular* battery would require "intentional selection" of *someone*; a *bias* battery would require *specific intent as the identity of the person selected*, i.e., because of that person's race, etc. Replicated across the code, this would create dual categories for each offense.

the decision, the *motive*.[28]

This "extra bit," we realize, transforms the event entirely. It imparts a directed and traumatizing injury inflicted upon the person for no other reason than the person's status. We have never disputed nor doubted the special harms which accompany these crimes. However, the immediate question in this context is not about *consequences*; nor even about legislative *power*. It is about *execution*. The question, then, is how do we define, identify, and then try in court that "extra bit"? *How* can the *element* which defines the crime be identified and quantified? It is still not clear whether this is a motivational-crime or a would-be intent crime(?). The point is that the legislative *power* question cannot be answered, or the principles at stake not truly "balanced," until the *execution* question is answered.

* Before leaving this section, we wish to mention that there is a colorable double jeopardy question. We raise it only to highlight the depth of the confusion about what this thing is[29]

WHAT QUANTUM OF MOTIVE IS REQUIRED?

The enhancer cannot survive vagueness or overbreadth unless the State can tell us what exactly triggers the enhancer. It must be clear to people of ordinary intelligence what the statute prohibits. This requirement, which derives from due process, is imperative when criminal penalties and First Amendment rights are involved.[30] The State has a duty to be clear about both the

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[28] *See*, LaFave, Scott, *Criminal Law*, § 3.5(e), (2nd ed. 1986)

[29] Two separate enhancer convictions *could* have been returned by the jury. If the gravamen is selection and that is an "act," then it seems clear that with only one victim selected, that only one charge could be returned. The enhancer cannot use itself to justify its own second application.

[30] *Grayned*, at 108-109, 2298-2299; *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 812 (1954); *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 497, 102 S.Ct. 1186, 1193 (1982); *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855, 1859 (1983) Fn. 8; *NAACP*

legal standard it is using, and also what *type* of behavior or speech, etc., it will consider as having violated the statute.

The phrase "*because of*" does not, by itself, indicate how much, or to what extent, the victim's status must motivate the selection decision. Whether it means "only", "sole", "primary", "substantial" or "in any part" is unclear. If this is an intent crime, the specific character of the *actus reus* must be explained; but how does one have "partial" intent? The State explains none of this, but does insist on maximum scope, however defined.[31]

The first talk of any specific limiting standards came in the dissent. Justice Bablitch asserted that the victim's status must be a "*substantial factor*" in the selection decision.(P.A. 71) However, he also advocated a "*but for*" standard.(P.A. 71) Since he mixes the two, one is uncertain which standard he would have the courts apply. ... *Besides*, why is Justice Bablitch discussing quantum causality factors at all when he maintains that this is an "intent" crime?[32] *Furthermore*, neither standard can be more than a suggestion. The Wisconsin State Legislature explicitly rejected the "*substantial factor*" test.[33] Clearly, a

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v. Button, 371 U.S. 415, 432, 83 S.Ct. 328, 337 (1963); *State v. Propanz*, 112 Wis.2d 166, 332 N.W.2d 750 (1983).

[31] In its brief to the Wisconsin Supreme Court the State refused to specify any particular standard, but did advise the court to "avoid using language in its published opinion which inadvertently might suggest that the penalty enhancer applies only if the victim was selected solely or principally due to race, etc." It also cited with approval an Oregon opinion which interpreted a similar Oregon statute to allow prosecution if the "unlawful motive plays any role" in the selection.(Pet. Wis.S.Ct. 16)

[32] *See*, LaFave, Scott, *Criminal Law*, § 3.12(b), (2nd ed. 1986); W. Page Keeton et al., *Prosser & Keeton on Torts*, § 41, (5th ed. 1984) "Substantial factor" goes to causality in the tort, it does not define a duty. *See, Sampson v. Laskin*, 224 N.W.2d 594, 597-98, 66 Wis.2d 318 (1975).

[33] The Legislature was offered, but rejected, an amendment which would have required the "substantial factor" test for restricting the sweep of the enhancer. ... "*was a substantial factor in making that selection*"

limiting construction cannot be framed around factors which the legislature has explicitly rejected.[34]

The State, apparently also unaware that it had been rejected, only now cautiously endorses the "*substantial factor*" test in a *footnote*.(P.A. 34 n. 4) It cited the dissent, but edited out reference to the "*but for*" test. Yet, in explaining the meaning of the "*substantial factor*" test, the State used the phrase, "*to the extent that in the absence of that status the perpetrator would not have selected the victim,*" which is itself unmistakably a paraphrase of a "*but for*" test. How the State intends to get out of this forest is a good question.

In sum, the State failed to specify any intelligible standard until now. Even now it selects a standard which was explicitly rejected by the State legislature. In attempting to explain its new standard, the State used terminology which implicates yet another standard, one we know it does not want. And to top it off, this all takes place in the shadow of a legislature which amended the statute to effectively erase all possible limitations. Together, this collective failure to identify a standard is the essence of vagueness and the grist of overbreadth. Clearly, if the prosecutor cannot even tell us what the standard is, no person on the street can possibly know where the limits of the enhancer lie.

WHAT TYPE OF MOTIVE IS REQUIRED?

The last, and most difficult question for the State is what *type* of motive is required. Either the State admits that the enhancer targets biased motive and only biased motive and face

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(Assembly Amendment 1, to 1991 Assembly Bill 507; rejected, Ayes 85, Noes 10; *Bulletin of the Proceedings of the Wisconsin Legislature 1991-92 Session*, Period ending June 20, 1992; pp. 135-136) (Copy attached).

[34] *See* Edward J. DeBartolo v. Florida Gulf Coast, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397 (1988); United States v. Locke, 471 U.S. 84, 98, 105 S.Ct. 1785, 1794 (1985); State v. Hurd, 135 Wis.2d 266, 400 N.W.2d 42, 46-47 (1986). Nor would the "*in whole or in part*" amendment, made law by then, heed a restrictive "*but for*" standard.

the First Amendment head on, or it waffle and thereby admit that it cannot correct the vagueness and overbreadth problems. So far it has done both. When necessary to compile a compelling State interest, it has said that the enhancer would address those crimes which occur "because of the *discriminatory motive* of the actor."(p. 8)(emphasis added). Yet when facing *R.A.V.* it claims that "the enhancer does not define itself in terms of 'motive'" (Pet. 34) Similarly, both dissenting Justices speak uniformly about *discriminatory* selection, but have either denied that bad motive is required (Justice Bablitch) or have essentially side-stepped the question (Justice Abrahamson).[35] It is our contention that the enhancer not only *does* target biased motive and *only* biased motive, but that it must do so in order to defeat vagueness and overbreadth problems.

The State attempts to avoid the dilemma by saying that the enhancer does not *require* any particular showing of bias.[36] It repeated its "*impress his peers*" hypothetical to argue that, "the fact that Todd Mitchell may not hate whites *does not diminish the seriousness of his crime*."(Pet. 37)(emphasis supplied) ... Our response is, *Yes, it would!* By definition, it would not be a hate crime if the perpetrator had no biased attitude toward the victim. That is, as soon as the race, etc., of the victim becomes important to the commission of the crime, a hate crime has occurred. However, the State has neither reason nor justification

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[35] Justice Abrahamson admits that it is the "defendant's bigotry" which must be "linked" to the selection, but that this should be limited to a "tight nexus."(P.A. 51) This certainly sounds like punishing biased motive. Presumably the nexus serves protective/exclusionary evidentiary functions. However, tight nexus or otherwise, she does not explain how the "defendant's bigotry" can be linked to anything without first proving in court that the defendant is a bigot. Seen from this perspective, the "tightness" of the nexus would seem to apply only to contemporanity, not to substance. It is still a motive-based approach, regardless how garbed.

[36] This same argument is repeated by many of the Amici; *e.g.*,. *The Brief of the United States* (p. 28); *The Brief of the States* (p. 19); Even *The Brief of the ACLU* (p. 12); The *ACLU's* examples are worth reading.

to punish people under a hate crimes statute if they neither harbor nor display any bias. One suspects that the State's hypothetical is leaking; i.e., that it was important to "impress his friends" that the victim be white. If this is the case, then the perpetrator would have adopted the bias of his peers for the purposes of the statute. If so, then *that* fact would have to be proven for a conviction. Hence bias *is* required. However, if the State tries to say that not even that would be required, then it must be prepared to admit that it would be convicting someone for a hate crime without *any* showing of bias. Hate crimes are uniquely harmful not merely because hatred is *suspected*, but because the perpetrator *intended* to project hatred and that intention is understood *as such*. Without that intent there may be distrust and misunderstanding, but there is no hate crime. The attack on Reddick would be a *terror* crime; an intent to *terrorize* requires no extended inference, such as the inquiry into bias.

The reason for discussing the *type* of motive that is required is important not merely for First Amendment prohibitions on *content-based* penalties, which the enhancer violates, but before that and more fundamentally, this goes to the complete failure to specify any scienter requirement. *"Bigotry"* cannot serve as a scienter requirement. It is not an *"element"*. Recognizing this problem, the State now attempts to say that *bias* is not required. *Ironically*, however, removing the *bias* requirement at this point, although itself illegitimate as an *"element,"* would cast the penalty enhancer completely adrift. It would become a rogue and unpredictable law, threatening to label as hate crimes offenders people who neither harbor nor have displayed any bias. A reformulation is clearly necessary.

REFORMULATING THE PROBLEM

Defining a hate crime in terms of "intentionally selecting" a victim "because of" his or her race, etc., may seem reasonable, but upon closer scrutiny, it becomes apparent that the pathology of hate crimes requires the focus to be reversed. A more "accurate" approach, is operationalized around the selection of

the *crime*, with the selection of the victim being a function of the crime selection. That is, a hate crime is one where the crime is perpetrated because of the victim's status. This is how *we* would read both the *Hate Crime Statistics Act* and the *ADL Model* statute, i.e., as employing a crime-selection focus."[37]

The *ADL Model* statute, for instance, finds a violation if a crime selection is made "by reason of" the victim's status. Thus, even though the Wisconsin statute was "modeled" upon the *ADL* parent statute, the two are <u>not</u> the same. Understandably, the *ADL* has submitted an Amicus in favor of one of its offspring. However, to the extent this analysis holds, the Wisconsin statute should fall on vagueness and overbreadth, while the *ADL Model* could survive *facial* invalidity *on this point*. However, since the *ADL Model* does still effectively target bias, it would still face the same First Amendment challenges and due process problems associated with making bias a type of element and punishing that biased motive as such directly in the guilt-phase of a trial. But regardless, if Wisconsin still insists that it not need target bias, the following typology will illustrate the difference between the crime-focused and the victim-focused approaches. We posit three possible types of crimes/victim selection combinations:

(1) those in which a *crime* is planned, but the *victim* is not yet selected;

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[37] 28 U.S.C. 534 note., 104 Stat. 140, *Hate Crime Statistics Act*; and *Trainin, Guide for Hate Crime Data Collection*, U.S. Department of Justice, Federal Bureau of Investigation, 1991. Reports on "crimes that manifest evidence of prejudice ..."; The *ADL Model:* "A person commits the crime of intimidation if, by reason of the ... race, etc. ... he violates Section _____ of the Penal Code; *Hate Crimes Statutes: 1991 Status Report; Anti-Defamation League*; 1991; p. 4. Similarly, *H.R. 4797 Hate Crimes Sentencing Enhancement Act*, although vague, does also orients around crime selection. A "hate crime" is "a crime in which the defendant's conduct was motivated by hatred, bias or prejudice, based on" race, etc. Finally, the *Amici Brief for Members of Congress*, appear to be describing hate crimes, not like Wisconsin's statute, but rather with a starting point at crime selection.(p. 6).

(2) those in which the selection of the *crime* and the *victim* occur in the same transaction;
(3) those in which the *crime* is selected because of the *victim*;

The *first* category is one where there is a criminal who needs a victim. The crime is planned, but the victim is not yet chosen. A mugger intends to mug someone, but it remains for the victim to be selected. This is the *garden-variety* type.

The *second* type is intended to encompass situations in which there is an altercation, perhaps a scuffle or a fight. It is posited that no altercation was intended ahead of time by the perpetrator, but rather one developed after the perpetrator and the ultimate victim met in some situation.

The *third* type is where the *crime* is selected *because of* the victim's identity. The crime selection is dictated by the victim's identity and is undertaken to harm the victim because of the victim's status. This type is the truly malignant crime, the true *hate crime*. In this situation it makes little sense to speak of an "underlying" crime, because the criminal act itself has no independent meaning beyond harming the victim because of the victim's status. It is true that hate crimes can generate from both of the first two categories, but as soon as the mugger decides to harm the victim because of the victim's status, or as soon as the altercation is initiated (or perpetuated) to harm a victim because of his or her status, these types convert into the third category.

The Wisconsin statute will catch category three criminals. The problem is that it cannot avoid sweeping in a host of "ordinary" crime situations which would not be considered "hate crimes" by any common understanding. If no showing of bias is required, it is a sure bet that our *garden-variety* criminal will soon become a hate crimes offender. This occurs *even if* we put the quantum requirement way up to "*deciding factor*," or even to *certainty!* A couple hypotheticals:

Assume as fact that our criminal "*intentionally selected*" a victim "*because of*" the race, religion, or ethnic group, etc.; but also assume as "fact" that our criminal harbors absolutely no status-based malice. Guilty or Not Guilty?

(1) Our criminal selects a white victim because he or she believes that white people have more money.
(2) Our criminal selects a black victim because he or she believes the police are less likely to respond effectively in that neighborhood.
(3) Our criminal selects someone from a particular ethnic group because that group is known to be wary of banks and typically keep rolls of cash in their mattresses.
(4) Our criminal becomes a sex offender and selects someone from the race he or she prefers.
(5) Our criminal needs cash and robs the store of someone he knows to be at worship at that hour.

According to the Wisconsin hate crimes enhancer we would now have five convictions for hate crimes.[38]

It has also begun to dawn on some that this formula would probably lead to minorities being punished more frequently than others. If the *Brief of the Crown Heights Coalition, NAACP, and the American Jewish Committee* truly believes in its examples, then this result seems a strong possibility.[39] The *Brief of the ACLU*, evidently a little nervous about these laws, urges courts to be "vigilant" to ensure that hate crime statutes "do not themselves become a vehicle for discrimination against minority groups." (p. 22). But how do they expect the courts to do that? Presumably the courts are there to enforce the laws as written. Quite simply, the courts would not need to be more "*vigilant*" if these laws were written better.

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[38] These examples are our own, but we noticed that one of Petitioner's Amici, *Brief of the Crown Heights Coalition, NAACP, and the American Jewish Committee*, included almost identical examples which they cited with approval!

[39] *Black Victims*, Special Report: Bureau of Justice Statistics, U.S. Department of Justice, April 1990. The figures indicate that, of all crimes of violence committed by single offenders against white or black victims, 69% involve a white offender and a white victim, 15% involved a black offender and a white victim, 11% involved a black offender and a black victim, and 2% involved a white offender and a black victim.

Next assume that our criminal consciously sought to *comply* with the enhancer, i.e., avoid intentionally selecting anybody because of that person's race, etc. How could this be done? To be entirely safe, the "complying criminal" might simply avoid all victims of another race, etc. This may well be a correct assessment, but it should not be. By intentionally avoiding people outside his or her own race, etc., our criminal would, by definition, be *intentionally selecting* victims within his or her race, etc. *because of* their race, etc. This is not only a literal violation, but it would seem to fit the rationale of the law as well. Now our complying criminal is in quite a quandary. Should our criminal distribute his or her victims proportionately among the various groups in the area? ... It would seem that the only "safe" crime, in terms of the enhancer, would be Justice Bablitch's "random" or "happenstance" crimes, whatever they are supposed to be in the context of *intent* crimes.(P.A. 64)

The *altercation* situation raises all of these problems and more. We have posited that these are situations where no confrontation was planned, but rather developed out of the situation. There are countless hypotheticals, but basically two sets of problems. The first is when racial insults or epithets are used during an altercation. It was this situation which particularly concerned the Wisconsin Supreme Court. It worried that the use of one bad word, unleashed in the heat of anger, could mean the difference between facing a battery or facing a battery plus a hate crimes enhancer charge.(P.A. 44) Nor could we rely upon traditional evidentiary rules. These rules revolve around relevance. If bias is made an *element*, the protections in the rules would be largely disabled.

The second, and more intractable problem is that of "mixed-motives" situations. Here the issue of *quantum* and *type* of motive becomes very difficult to apply. We are used to punishing for multiple intents, but it makes little sense to speak of *partial* or *mixed* intent. The prospect of importing mixed-motive logic and procedures from employment law into the criminal law is unsettling at best. A "*but for*" test, if administered literally, would put away many people who would

otherwise not be considered hate crimes offenders, especially if one factors in "subconscious" racism. And if not administered literally, then what? *Price Waterhouse*?

Finally, who is to determine what constitutes bias? And how? In the sentencing context, with presentencing reports, etc., courts generally can handle such questions with due competence. Placing this question in a trial, however, is a much different matter. Asking the judge or jury to determine whether someone is guilty of the element of bias in a criminal trial cuts too close to the protections the First Amendment affords to even those we rightfully denounce. Prosecuting someone for *terror* would not offend this; making *bias* an element would. Nor is it an answer to say that courts are constantly faced with these types of difficult problems. The ability to reach an *outcome* is not the same thing as *competence*. The whole point of our First Amendment and evidentiary rules protections is to deny courts the opportunity to even *seek* competence in such matters.

CONCLUDING REMARKS

Since it is category three that we all agree should be targeted, we again suggest that an *anti-terror* statute could reach these crimes without taking recourse to *content-based* criteria. An *anti-terror* statute would provide a specifiable *actus reus* and objective referent for intent, comparable to *interference* in civil rights provisions. It would also address the *effects* directly; making it even more protective than hate crimes statutes, which are actually underinclusive. Hatred may be sufficient for terror, but is not necessary. It has also been suggested that an *anti-terror* statute could incorporate community-group referents, thereby encompassing communities as communities and not merely because of certain immutable characteristics the people there share. Finally, we have suggested more vigorous use of aggravating factors. Since it is very likely that a hate crime will involve aggravating factors, the availability of this tool is not an issue. The current training law enforcement is receiving in bias crimes could be applied equally effectively through these tools.

Perhaps most importantly, we would urge resistance to laws which reinforce the pressures to define ourselves separately as groups instead of as one people. Some may believe it naive to still believe in one integrated society in America, and it may be, but we are certain never to achieve this goal if we do not focus all our energies and efforts to constantly serve and reflect that goal. Content-neutrality is one of the values offended, at least in process, by these laws. Group-neutrality is a value which, while not offended, may not be properly served by this type of law. As we become a very different country entering the twenty-first century, we should take care to ensure that our goal of integration tomorrow is served by the laws of today. With this we make no reference here to Affirmative Action, a policy which on its terms could not be achieved by a group-neutral alternative. However, that is not the case here. We know that integration is harmed by hate crimes, and for that reason seek to combat them. However, we also believe that integration may not be best served by laws which tend to classify us by group. There are a lot of unanswered questions about the group focus of these laws. The *ADL Model* has given some uniformity, but many variations exist. That opens onto questions. How, for instance, do groups, or rather status-groups get onto the list? How do we rationalize denying some group entry? Surely we cannot say because the group does not have enough votes. The whole point is to assist groups which cannot otherwise sufficiently defend themselves. How do we justify having "sexual orientation" on one list but not another? What about gender? Wisconsin included disability, why have others not done so? Could we ever justify taking a group off the list at some point? What would that signify? How will a listing in these statutes intersect with other laws? Would an appropriate listing have allowed another result in *Bray*? But most importantly, how will the listing impact upon the groups themselves and on relations amongst groups? The Court cannot legislate, but neither need it accept a compelling State interest without some inquiry as to the larger effects this method would have, especially when there are content-neutral alternatives to achieve the same ends.

1991-92 Legislature STATE OF WISCONSIN LRBa1096/1
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ASSEMBLY AMENDMENT 1

TO 1991 ASSEMBLY BILL 507

October 16, 1991 - Offered by Representative YOUNG.

At the locations indicated, amend the bill as follows:

1. Page 2, line 4: delete lines 4 to 7 and substitute: "damaged or otherwise affected by the crime under par. (a) ~~because of~~ and the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property was a substantial factor in making that selection, whether".

(End)

U.S. Department of Justice

Federal Bureau of Investigation

Washington, D. C. 20535

FOR IMMEDIATE RELEASE

Director William S. Sessions today released the first data available from the FBI's statistical program on hate crimes. The program was initiated in response to the Hate Crime Statistics Act of 1990 and is being implemented by law enforcement agencies across the Nation. "While these initial data are limited," commented Director Sessions, "they give us our first assessment of the nature of crimes motivated by bias in our society." The data cover calendar year 1991 and were supplied by nearly 3,000 law enforcement agencies in 32 states. Hate crime occurrences were recorded by 27 percent of the 2,771 agencies participating; the remainder reported no such offenses came to their attention.

A total of 4,558 hate crime incidents involving 4,755 offenses were reported in 1991. Among the offenses measured, intimidation was the most frequently reported hate crime, accounting for 1 of 3 offenses. Following were destruction/damage/vandalism of property, 27 percent; simple assault, 17 percent; aggravated assault, 16 percent; and robbery, 3 percent. The remaining offense types; murder, forcible rape, burglary, larceny-theft, motor vehicle theft, and arson; each accounted for 1 percent or less of the total.

Racial bias motivated 6 of 10 offenses reported; religious bias, 2 of 10; and ethnic and sexual-orientation bias, each 1 of 10. Among the specific bias types, anti-black offenses accounted for the highest percentage, 36 percent of the total. Anti-white and anti-Jewish motivations followed with 19 and 17 percent, respectively.

Information concerning the offenders was unknown for 43 percent of the incidents reported. Considering incidents for which suspected race of the offender was reported, 65 percent of the hate crimes were committed by whites, 30 percent by blacks, and 2 percent by persons of other races. The remainder of the incidents were committed by groups of offenders not all of the same race.

The accompanying tables provide specific hate crime data. A more comprehensive report is planned for the spring of 1993.

Hate Crime Offense Codes Reported, 1991

	Number	Percent*
Murder	12	.3
Forcible Rape	7	.1
Robbery	119	2.5
Aggravated Assault	773	16.3
Burglary	56	1.2
Larceny-theft	22	0.5
Motor Vehicle Theft	0	0.0
Arson	55	1.2
Simple Assault	796	16.7
Intimidation	1,614	33.9
Destruction/Damage/Vandalism of Property	1,301	27.4
Total Number of Offense Types	4,755	100.0

*Because of rounding, percentages do not add to total.

Hate Crime Bias-Motivations Reported, 1991

Bias-Motivation	Number	Percent*
Race	**2,963**	**62.3**
Anti-White	888	18.7
Anti-Black	1,689	35.5
Anti-American Indian/Alaskan Native	11	0.2
Anti-Asian/Pacific Islander	287	6.0
Anti-Multi-Racial Group	88	1.9
Ethnicity	**450**	**9.5**
Anti-Hispanic	242	5.1
Anti-Other Ethnicity/National Origin	208	4.4
Religion	**917**	**19.3**
Anti-Jewish	792	16.7
Anti-Catholic	23	0.5
Anti-Protestant	26	0.5
Anti-Islamic (Moslem)	10	0.2
Anti-Other Religion	51	1.1
Anti-Multi-Religious Group	11	0.2
Anti-Atheism/Agnosticism/etc.	4	0.1
Sexual Orientation	**425**	**8.9**
Anti-Homosexual	421	8.9
Anti-Heterosexual	3	0.1
Anti-Bisexual	1	0.0
Total	4,755	100.0

*Because of rounding, percentages may not add to totals.

Suspected Race of Offenders in Hate Crimes, 1991

Suspected Race of Offender	Number of Incidents	Percent
White	1,679	36.8
Black	769	16.9
American Indian/Alaskan Native	12	0.3
Asian/Pacific Islander	47	1.0
Multi-racial group	77	1.7
Unknown	1,974	43.3
Total Incidents	4,558*	100.0

*A single incident may involve more than one offense.

Agency Participation in Hate Crime Reporting, 1991

State	Agencies Participating*	Incidents Reported
ARIZONA	1	48
ARKANSAS	169	10
CALIFORNIA	2	5
COLORADO	194	128
CONNECTICUT	29	69
DELAWARE	58	29
GEORGIA	2	23
IDAHO	98	33
ILLINOIS	26	133
INDIANA	1	0
IOWA	201	89
KANSAS	3	6
KENTUCKY	1	0
LOUISIANA	6	0
MARYLAND	156	431
MASSACHUSETTS	30	200
MINNESOTA	42	225
MISSISSIPPI	4	1
MISSOURI	18	136
NEVADA	1	16
NEW JERSEY	271	895
NEW MEXICO	1	0
NEW YORK	773	943
OHIO	30	80
OKLAHOMA	7	99
OREGON	39	296
PENNSYLVANIA	50	277
TENNESSEE	2	1
TEXAS	28	95
VIRGINIA	19	53
WASHINGTON	206	196
WISCONSIN	303	41
Total	2,771	4,558

*Includes agencies participating in Program whether or not any incidents were experienced.

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